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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITIZENS AGAINST THE 24TH STREET
WIDENING PROJECT,

Plaintiff and Appellant,

v.

CITY OF BAKERSFIELD,

Defendant and Respondent;

DEPARTMENT OF TRANSPORTATION,

Real Party in Interest and Respondent.

F076352

(Kern Super. Ct.
No. S1500CV281556)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Channel Law Group, Jamie T. Hall and Julian K. Quattlebaum, for Plaintiff and Appellant.

Virginia A. Gennaro, City Attorney, Andrew Heglund, Deputy City Attorney; Lewis Brisbois Bisgaard & Smith and Daniel V. Hyde for Defendant and Respondent.

Judith Carlson for Real Party in Interest and Respondent.

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INTRODUCTION

Petitioner (appellant) filed a California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.)¹ action challenging the sufficiency of a 2013 environmental impact report (EIR) for a project called the 24th Street Widening Project. Petitioner prevailed, and the superior court granted a peremptory writ directing respondent City of Bakersfield (Bakersfield) to set aside its approval of the project and augment environmental review of the project. Bakersfield prepared a new EIR (the “2016 EIR”) and reapproved the project. Bakersfield filed a “return to the peremptory writ” (§ 21168.9, subd. (b)), claiming its 2016 EIR complied with the mandates of the writ and asking the court to discharge the writ. In conjunction with its return, Bakersfield prepared and filed a supplemental administrative record.

Petitioner subsequently filed a second CEQA action, this time arguing Bakersfield’s 2016 EIR was inadequate. Petitioner also opposed Bakersfield’s return in the first action. Eventually, the trial court accepted Bakersfield’s return and discharged the writ from the first action and denied petitioner relief in the second action.

This appeal relates to respondents’ request for costs of suit, the bulk of which arise from the preparation of the supplemental administrative record.

As explained below, we conclude that (1) petitioner was the prevailing party in the first action, and (2) the cost of preparing the supplemental administrative record was a cost of the first action, not the second action.² As a result, respondents are not entitled to recover the cost of preparing the supplemental administrative record as prevailing parties.

¹ All further statutory references are to the Public Resources Code unless otherwise noted.

² These conclusions moot the remainder of the parties’ contentions.

Accordingly, we reverse the trial court's order denying petitioner's motion to tax costs, in part.³

FACTS

24th Street Widening Project

The 24th Street Widening Project is a collection of improvements along 24th Street from west of SR-99 to 0.2 mile east of M Street, a distance of about 2.1 miles, and improvements on SR-99 for a northbound auxiliary lane to the Kern River Bridge.

The main features of the project are improvements at the Oak Street/24th Street intersection, just east of the Kern River Bridge, and the widening of 24th Street between Olive Street and D Street. Other proposed actions included widening the 23rd Street/24th Street couplet between D Street and M Street, and improvements at State Route 178.

Environmental Review and Separate Cul-de-Sac Project

In 2012, a draft EIR/Environmental Assessment was created in preparation of widening 24th Street (among other improvements.) ("2012 DEIR.")

In response to the release of the 2012 DEIR, certain residents requested that the city construct cul-de-sacs at Beech, Myrtle, Spruce, Pine, Cedar and A Streets on the south side of 24th Street. Bakersfield approved these six cul-de-sacs as a *separate* project with a negative declaration.

Respondents prepared a final EIR dated December 2013 (the "2013 FEIR"). Pursuant to public input on the 2012 DEIR, the project now included the installation of a cul-de-sac on B Street. The location of the Elm Street cul-de-sac was also modified. However, the cul-de-sacs at Beech, Myrtle, Spruce, Pine, Cedar and A Streets remained a separate project.

³ In its opening brief, petitioner requests that this court remand with instructions for the court to award costs to petitioner. We decline to do so, as petitioner does not cite to any cost memorandum it filed with the trial court.

Citizens I

Petitioner filed a CEQA suit challenging the 2013 FEIR in Kern County Superior Court on March 17, 2014. We will refer to this action as *Citizens I*.⁴

After a hearing, the superior court ruled (1) that the separation of the six cul-de-sacs into a separate project was improper piecemealing under CEQA, and (2) that the 2013 FEIR failed to adequately discuss and analyze eight potentially feasible alternatives to the project. The superior court issued a writ, pursuant to which Bakersfield decertified the 2013 FEIR in September 2015.

Under section 21168.9, subdivision (b), the trial court retained jurisdiction “over the public agency’s proceedings by way of a return to the peremptory writ until the court has determined that the public agency has complied with” CEQA. (§ 21168.9, subd. (b).) Accordingly, on October 5, 2015, respondents filed an “initial” return to the superior court’s writ. The return indicated that, in order to comply with the court’s writ, respondents would create a Recirculated Draft Environmental Report. (“R-DEIR”) The R-DEIR would “provide[] additional information and clearly discloses the reasons for selecting potentially-feasible alternatives and discusses whether or not each of the potentially feasible alternatives satisfies at least one of the four threshold criteria under CEQA Guidelines Section 15126.6.” The R-DEIR would also “supplement the Project Description to include the cul-de-sac history and analyze the additional cul-de-sacs requested by the public as a part of the Project, including a description of any new impacts on visual and historic resources.”⁵ The return also set forth a proposed schedule for various events, such as the release of the final EIR, review by the Planning Commission, etc.

On June 8, 2016, the City of Bakersfield certified the final EIR and approved the project.

⁴ In *Citizens I*, petitioner initially elected to prepare the administrative record. However, the parties subsequently agreed that Bakersfield would prepare the record.

⁵ The phrase “on visual and historic resources” is barely legible in the record, but we believe that is what the text says.

On June 17, 2016, respondents filed a return to the writ of mandate. Respondents asserted that they had performed the additional environmental review required by the court's writ and requested that the court discharge its writ. Also, on June 17, 2016, respondents lodged a supplemental administrative record. The bulk of the costs at issue in this appeal pertain to the cost of preparing this supplemental administrative record.

Citizens II

On July 8, 2016, petitioner filed a new petition for writ of mandate challenging the 2016 R-FEIR (*Citizens II*). Petitioner alleged numerous deficiencies, including failure to examine changed circumstances between the original 2013 FEIR and the 2016 R-FEIR. In the *Citizens II* petition, and in a separate notice of election, petitioner indicated it would prepare the administrative record. However, it appears that no additional administrative record was filed, and the parties instead cited to the administrative record and supplemental administrative record filed in *Citizens I*.

Petitioner's Opposition to Return in Citizens I

On August 5, 2016, petitioner filed an opposition to respondents' request that the court discharge its writ in *Citizens I*. The opposition was 30 pages long and contained 14 headings, each alleging a CEQA violation.

Consolidated Proceedings

On September 12, 2016, the superior court consolidated respondents' request to discharge the writ in *Citizens I* with the writ petition challenging the 2016 R-FEIR (i.e., *Citizens II*).

After a hearing, the court ruled in respondents' favor in the consolidated proceedings. In an order filed October 25, 2016, the court discharged its writ in *Citizens I* and denied petitioner's petition for writ of mandate in *Citizens II*. In an unpublished opinion filed July 2, 2018, this court affirmed the trial court's judgment in *Citizens II*. (*Citizens Against 24th Street Widening Project v. City of Bakersfield* (July 2, 2018, F074693) [nonpub. opn.])

Bakersfield filed a memorandum of costs on October 25, 2016, seeking \$564 for “Court-ordered transcripts”; \$212 for “Blowups of Hearing exhibits”; \$29,361 for “Preparation of Supplemental Administrative Record”; and \$2,604.11 for “Preparation of Excerpts of the Supplemental Administrative Record.”

On November 14, 2016, petitioner moved to tax costs. The court granted the motion in part, reducing the costs recoverable by respondents to \$20,315.83. The costs awarded by the court included \$11,953.39, paid to Parsons Infrastructure Group to identify and add documents to the supplemental administrative record; \$4,111.55, paid to Blueprint Service Co. for copying the supplemental administrative record and related expenses; \$1,362.91 for City of Bakersfield staff costs related to the supplemental administrative record; and \$2,487.98, to prepare excerpts of the supplemental administrative record requested by the court. Petitioner appeals the order denying, in part, its motion to tax costs.

DISCUSSION

Cost Recovery by Prevailing Parties in CEQA Cases

Generally, “a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.” (Code Civ. Proc, § 1032, subd. (a)(4)(b).) “ ‘Prevailing party’ includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against the defendant. If any party recovers other than monetary relief and in situations other than as specified, the ‘prevailing party’ shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed, may apportion costs between the parties on the same or adverse sides” (Code Civ. Proc., § 1032, subd. (a)(4).)

In a CEQA case, the “parties shall pay any reasonable costs or fees imposed for the preparation of the record of proceedings in conformance with any law or rule of court.” (§ 21167.6, subd. (b)(1).)

Under these statutory provisions, “ ‘the prevailing party in a CEQA proceeding ... may recover as costs the amounts it reasonably and necessarily incurred in preparing the ROP [record of proceedings].’ [Citation.]” (*St. Vincent’s School for Boys, Catholic Charities CYO v. City of San Rafael* (2008) 161 Cal.App.4th 989, 1014.)

CEQA Writ Proceedings

To understand the present dispute about who is the relevant “prevailing party,” it is necessary to explore the nature of CEQA writ proceedings.

A petitioner may file a lawsuit to void certain acts of a public agency on grounds of noncompliance with CEQA. (See § 21167.) If the petitioner prevails, and the court finds that the public agency made a decision in violation of CEQA, it shall issue a peremptory writ of mandate specifying what actions the public agency must take to comply with CEQA. (§ 21168.9, subds. (a)–(b); see also Code Civ. Proc., § 1085.) The writ shall do one or more of the following: mandate that the public agency void its decision in whole or in part; mandate that the public agency bring the decision into compliance with CEQA; and/or mandate that the public agency and any real parties in interest suspend any or all specific project activities until the agency has complied with CEQA. (§ 21168.9, subd. (a)(1)–(3).)

“The trial court shall retain jurisdiction over the public agency’s proceedings by way of a return to the peremptory writ until the court has determined that the public agency has complied with” CEQA. (§ 21168.9, subd. (b).)

As these provisions make clear, the purpose of the “proceedings by way of a return to the peremptory writ” is to ensure the public agency has complied with the peremptory writ by remedying the CEQA violations it identified. (See § 21168.9, subd. (b).) Indeed, the trial court’s jurisdiction is limited to that specific purpose. (*Alliance of Concerned Citizens for Responsible Development v. City of San Juan Bautista* (2018) 29 Cal.App.5th 424, 444.)

Analysis

Petitioner argues:

“Petitioner succeeded in requiring Respondent to correct its failure to comply with CEQA. Respondent’s motion to discharge the writ was simply part of that compliance. The fact that the Court discharged the motion [*sic*] does not render the Respondent the prevailing party in the case. The Supplemental Administrative Record in question was not prepared in response to the Petitioner’s Opposition; it was prepared in support of Respondent’s Return. At the time of its preparation, there was no opposition. It is therefore not appropriate to treat it as a cost of some subsequent proceeding on Petitioner’s second Petition. It was clearly part of the costs incurred in connection with the original case in which the Petitioner was the prevailing party.”

Respondents counter that they were the prevailing party in the “proceedings establishing [their] compliance with the writ” and were therefore “entitled to recover ... costs in providing supplements to the record which established its compliance with CEQA”

Petitioner is correct. Complying with a peremptory writ and having the writ discharged as a result cannot logically be the basis for prevailing party status in CEQA litigation. If litigant A successfully petitions the court for a mandate compelling litigant B to remedy legal violations, litigant B should not be considered the prevailing party simply because it eventually complied with the mandate. A contrary rule would mean that virtually no CEQA petitioners would ever be prevailing parties because public agencies must always eventually comply with a court’s peremptory writ.⁶

Respondents correctly note that they prevailed in *Citizens II*.⁷ But as respondents have observed, *Citizens I* and *Citizens II* were “clearly separate” proceedings even though

⁶ Respondents note that they sought to establish compliance “over the opposition” of petitioner. Similarly, they argue that the fact petitioner opposed the return “has consequences.” But respondents filed the supplemental administrative record before petitioner opposed the return. The supplemental administrative record was clearly prepared to meet *respondents*’ obligations in the “proceedings by way of a return to the peremptory writ” (§ 21168.9, subd. (b)) in *Citizens I*, not to meet *petitioner*’s opposition which had not yet been filed.

⁷ Respondents argue that *Citizens II* and the return proceedings in *Citizens I* concern the same subject matter: the adequacy of the R-FEIR. Therefore, respondents should be considered the prevailing party in the “proceedings” on the adequacy of the R-FEIR. We do

the court consolidated the return proceedings of *Citizens I* with the petition in *Citizens II*. The supplemental administrative record was prepared for the “proceedings by way of a return to the peremptory writ” (§ 21168.9, subd. (b)) in *Citizens I*. Thus, costs of preparing the supplemental administrative record were costs incurred in *Citizens I*, not *Citizens II*. Indeed, the costs were incurred before *Citizens II* was even filed. And because petitioner was the prevailing party in *Citizens I*, the costs cannot be recovered by respondents.⁸

DISPOSITION

The court’s order denying in part petitioner’s motion to tax costs is reversed. The court is directed to enter an order taxing all costs sought by respondents except the \$2,487.98, requested for the cost of preparing the excerpts of the supplemental administrative record. Petitioner shall recover costs on appeal.

POOCHIGIAN, J.

WE CONCUR:

HILL, P.J.

MEEHAN, J.

not find this attempt to splice the two lawsuits persuasive. Proving compliance with a peremptory writ through a return is most naturally viewed as part of the proceeding in which the writ was issued.

⁸ This reasoning, however, does not apply to the \$2,487.98, in costs for preparing excerpts of the supplemental administrative record at the court’s request. Below, petitioner conceded that copying costs for the excerpts were recoverable. The trial court ultimately found the cost recoverable (see *Coalition for Adequate Review v. City and County of San Francisco* (2014) 229 Cal.App.4th 1043, 1061), and petitioner’s appellate brief does not challenge this line item specifically. Therefore, that part of the cost award will remain intact.